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NEW DIRECTIONS IN PROTEST POLICING

EDWARD R. MAGUIRE*

INTRODUCTION

On August 9, 2014, a white police officer in Ferguson, Missouri shot and killed an unarmed 18-year-old African-American man named Michael Brown.¹ While the details of the shooting are disputed, for many black residents in the area, the incident represented the culmination of a long line of abusive police practices targeted primarily toward African Americans.² The controversial shooting triggered months of mass demonstrations in the St. Louis area.³ The protests intensified on November 24, 2014 when the grand jury decided not to indict the officer.⁴ The way area police departments responded to the protests was viewed by critics as heavy-handed and overly militarized.⁵ An after-action assessment sponsored by the Justice Department's Office of Community Oriented Policing Services (COPS) concluded that police relied on "ineffective and inappropriate strategies and tactics" that had the "unintended consequence of escalating rather than diminishing tensions."⁶

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1. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 29, n.17 (Mar. 4, 2015) [hereinafter FERGUSON POLICE DEPARTMENT INVESTIGATION].

2. *See id.* at 4.

3. Monica Davey & Julie Bosman, *Protests Flare after Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0; *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354>.

4. Davey & Bosman, *supra* note 3.

5. Pete Williams, *DOJ Report Faults Police Response to Ferguson Protest*, NBC NEWS (June 30, 2015, 1:36 PM), <http://www.nbcnews.com/news/us-news/doj-report-faults-police-response-ferguson-protest-n384561>.

6. INST. FOR INTERGOVERNMENTAL RESEARCH, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U. S. DEP'T OF JUSTICE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI xiv (2015).

The Ferguson protests spread nationally, helping to launch what COPS Director Ronald Davis called “a new civil rights movement” in the U.S.⁷ The police response to the Ferguson protests led, in part, to President Barack Obama’s decision to establish the President’s Task Force on 21st Century Policing in December 2014, the first presidentially appointed blue ribbon panel to examine policing practices in the U.S. in nearly 50 years.⁸ When the Task Force released its report to the president in May 2015, it called for an overhaul in the way American police agencies handle protests and mass demonstrations.⁹

This article examines protest policing practices in the U.S. and offers suggestions for improving how police prepare for and respond to protests and mass demonstrations. Part I of the article examines the police response to the protests that occurred in and around Ferguson, Missouri after the killing of Michael Brown. I focus in particular on the various civil rights violations committed by police officers against protesters and journalists. Part II establishes a broader historical context for thinking about how protest policing has evolved in the U.S. over the past fifty years. The police response to the protests in and around Ferguson did not occur in a vacuum; it was consistent with an unfortunate trajectory in the recent evolution of protest policing in the U.S. Part III provides a brief overview of two bodies of social science research – one on the psychology of compliance and defiance, and the other on crowd psychology – with direct implications for improving protest policing strategies. Part IV draws on this research evidence in outlining a new vision for protest policing in the U.S.

I. THE PROTESTS IN AND AROUND FERGUSON, MISSOURI

Shortly after the shooting of Michael Brown at 12:02 p.m. on Saturday, August 9, 2014, an “increasingly hostile” crowd gathered near the homicide scene on Canfield Drive in Ferguson, Missouri.¹⁰ Within two hours, police at the scene issued a mutual aid request to assist with crowd control; officers from 29 agencies responded.¹¹ The crowd was incensed that Brown’s body remained lying face down in the middle of the road for four hours while investigators processed the scene.¹² Residents and police reported hearing

7. *See id.* at ix.

8. WASHINGTON, DC COPS OFFICE, PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

9. *See id.*

10. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 6.

11. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 9.

12. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (August 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

multiple gunshots in the area. As the crowd continued to grow and become more hostile toward police, tactical officers wearing riot gear arrived on the scene.¹³ After police finished processing the homicide scene, protests continued into the evening in various locations around Ferguson, including across the street from the Ferguson Police Department.¹⁴

The next day, demonstrators assembled in multiple locations in and around Ferguson. Police estimated that the total size of the crowds reached about 1,000 people, some of whom were described as behaving in a confrontational and aggressive manner toward police.¹⁵ Protesters began to block streets, disrupt traffic, and throw objects at police officers and police vehicles.¹⁶ Further requests for mutual aid were issued, and police reinforcements from multiple agencies continued to arrive.¹⁷ That evening, demonstrators looted more than 30 area businesses and burned down a convenience store.¹⁸ The after action assessment notes that “in their attempt to gain control of the situation, several agencies deployed armored vehicles and canines.”¹⁹ Protesters ignored police orders to disperse, and as a result police deployed smoke canisters to disperse the crowds. When the smoke proved ineffective, police deployed CS gas.²⁰ The crowds began to dissipate, though some protesters and looters remained active until after 3:00 a.m.²¹

By August 11th, two days after the shooting, a pattern began to emerge in which demonstrations held during the daytime were mostly peaceful.²² By evening, however, portions of the crowd began to behave in a more disorderly manner, engaging in vandalism and looting, and in some cases firing guns.²³ According to the after-action assessment: “that night, the group of protesters

13. *See id.*; *see also* INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 10.

14. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 11.

15. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 11.

16. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 12.

17. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 12–13.

18. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 15.

19. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 12.

20. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 14–15. CS gas is a type of tear gas used by police primarily for riot control. Exposure to CS gas causes burning and irritation of the eyes, nose, mouth and throat. It is intended to temporarily incapacitate those who are exposed to it and to encourage compliance with police requests to disperse. Elspeth Worthington & Patrick A. Nee, *CS Exposure - Clinical Effects and Management*, 16 J. ACCID. EMERG. MED. 168 (1999); Leo J. Schep, Robin J. Slaughter, & David Ian McBride, *Riot Control Agents: The Tear Gases CN, CS and OC - A Medical Review*, 161 J. ROYAL ARMY. MED. CORPS 94 (2015).

21. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 15.

22. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 17.

23. *See* INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 17; *see also* Joe Lamie, *Crisis in Ferguson: More Businesses Looted Overnight*, FOX2NOW (August 16, 2014, 3:44 AM), <http://fox2now.com/2014/08/16/crisis-in-ferguson/>.

became even larger than previous nights. Police reported that demonstrators were throwing rocks, bottles, frozen bottles of water, Molotov cocktails, and other objects.²⁴ The mass gatherings became more vocal and aggressive with burning of businesses and other property damage, including looting and breaking windows.²⁵ Law enforcement responded with the use of armored vehicles, tear gas, PepperBall projectiles, bean bag rounds, and Stingerballs to disperse the crowds.”²⁶

As the daily protests continued, the St. Louis County Police and other area police agencies came under intense criticism for their use of aggressive, militaristic tactics to control the protests.²⁷ Sam Dotson, Chief of the St. Louis Metropolitan Police Department, chose not to send tactical resources to assist in the protest response because he disagreed with the tactics being used.²⁸ On August 14th, President Barack Obama weighed in, first condemning protesters who engaged in criminal behavior, and then noting that there is “no excuse for police to use excessive force against peaceful protests or to throw protesters in jail for lawfully exercising their First Amendment rights.”²⁹

The heavy-handed police response to protests in and around Ferguson resulted in several civil rights lawsuits.³⁰ For example, six protesters alleged that three area police agencies (St. Louis Metropolitan Police, St. Louis County Police, and the Missouri State Highway Patrol) used indiscriminate force against them while they were engaged in constitutionally protected behavior under the First, Fourth, and Fourteenth Amendments. According to the plaintiffs, they were

“...subjected to actions by police acting under authority of command now designated as the Unified Command, designed to frighten and intimidate plaintiffs and to deter their continued exercise of First Amendment rights. Officers acting under authority of Unified Command have intimidated demonstrators, impeded their entry or exit from demonstrations, assaulted them with chemical agents including tear gas and pepper spray, shot them with

24. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 16.

25. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 16.

26. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 16.

27. Howard Koplowitz, *Ferguson Protests: Why do the Police Look Like the Military?*, INT’L BUS. TIMES (Aug. 14, 2014, 4:53 PM), <http://www.ibtimes.com/ferguson-protests-why-do-police-look-military-1659098>; Mark Thompson, *Why Ferguson Looks So Much Like Iraq*, TIME (Aug. 14, 2014), <http://time.com/3111455/ferguson-missouri-michael-brown-iraq>.

28. Jeremy Kohler, *St. Louis Police Chief Says He Does Not Support Militarized Tactics in Ferguson*, ST. LOUIS POST-DISPATCH (Aug. 14, 2014), http://www.stltoday.com/news/local/crime-and-courts/st-louis-police-chief-says-he-does-not-support-militarized/article_b401feba-b49e-5b79-8926-19481191726f.html.

29. Zeke J. Miller, *Obama: ‘No Excuse’ for Ferguson Violence*, TIME (Aug. 14, 2014), <http://time.com/3111730/barack-obama-ferguson-michael-brown/>.

30. Templeton, et al. v. Dotson, et al., U.S. District Court, Eastern District of Missouri, Eastern Division, Case No. 4:14-CV-2019, Complaint (December 8, 2014).

so-called ‘less than lethal’ projectiles, rounded them up in mass arrests, engaged in physical and verbal abuse, failed to visibly identify themselves, and categorically labeled demonstrations as unlawful assemblies.”³¹

In December 2014, a federal judge issued a temporary restraining order against the three police agencies named in the lawsuit.³² Her decision noted that police had done a poor job of distinguishing between peaceful protesters and criminals.³³ She concluded that “people involved in peaceful, nonviolent political speech can do that without being lumped in with the criminals.”³⁴ In March 2015, the parties settled the lawsuit.³⁵ In the settlement agreement, the three agencies agreed to refrain from using chemical agents to disperse people not engaged in criminal activity unless they first issue “clear and unambiguous warnings” that chemical agents will be used,” provide people with the opportunity to “heed the warnings and exit the area,” adopt reasonable measures to minimize the impact of chemical agents on people who are complying with lawful police commands, and provide people with a safe means of exiting the area.³⁶ The agreement also specified that police cannot use chemical agents on people who are not engaged in criminal activity “for the purpose of frightening them or punishing them for exercising their constitutional rights.”³⁷

The police were also accused of interfering with the work of professional journalists covering the demonstrations.³⁸ From August to November of 2014, 24 journalists were arrested in the Ferguson area.³⁹ Audio and video recordings of police officers threatening or using force against journalists quickly went

31. *Id.* at 2.

32. Joel Currier, *Judge Orders St. Louis Area Police to Give Protesters Tear Gas Warning and Time to Flee*, ST. LOUIS POST-DISPATCH (Dec. 11, 2014), http://www.stltoday.com/news/local/crime-and-courts/judge-orders-st-louis-area-police-to-give-protesters-tear/article_d93628c7-cc4e-5dfa-9873-cd4baf59ad73.html.

33. *See id.*

34. Currier, *supra* note 32.

35. Motion to Dismiss Pursuant to Settlement as to All Defendants at 1, Templeton, et al. v. Dotson, et al., No. 4:14-CV-2019 (8th Cir. Mar. 25, 2015).

36. *Id.* at 2

37. *Id.*

38. Abby Phillip, *Police in Ferguson Arrest and Threaten More Journalists*, WASH. POST, Aug. 18, 2014, <https://www.washingtonpost.com/news/post-nation/wp/2014/08/18/police-in-ferguson-arrest-and-threaten-more-journalists/>; Jennifer S. Mann, *St. Louis County Police Agree to Court Settlements with 2 Journalists Arrested in Ferguson*, ST. LOUIS POST-DISPATCH (Aug. 3, 2015) http://www.stltoday.com/news/local/crime-and-courts/st-louis-county-police-agree-to-court-settlements-with-journalists/article_54147eba-0dbf-5bed-9915-5251f7aae3b5.html.

39. Runa A. Sandvik, *Documenting the Arrests of Journalists in Ferguson*, FREEDOM OF THE PRESS FOUND. (Nov. 26, 2014), <https://freedom.press/blog/2014/08/documenting-arrests-journalists-ferguson>.

viral.⁴⁰ In August 2014, attorneys representing three area police departments (Ferguson Police Department, St. Louis County Police Department, and the Missouri State Highway Patrol) signed an agreement in federal court with a journalist who had filed a civil rights lawsuit against them.⁴¹ The agreement stipulated:

“Parties acknowledge and agree that the media and members of the public have a right to record public events without abridgement unless it obstructs the activity or threatens the safety of others, or physically interferes with the ability of law enforcement officers to perform their duties.”⁴²

As the protests continued, the plaintiff in this case alleged that police were violating the agreement and continuing to obstruct the freedom of the press.⁴³ As a result, on November 21, 2014, a federal judge issued preliminary injunctions permanently enjoining (prohibiting) each agency from “interfering with individuals who are photographing or recording at public places but who are not threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties.”⁴⁴

In March 2015, four professional journalists filed a federal civil rights lawsuit alleging that the St. Louis County Police Department and 20 of its officers violated their constitutional rights under the First, Fourth, and Fourteenth Amendments with the intention of “obstructing, chilling, deterring, and retaliating against” them for doing their jobs.⁴⁵ That lawsuit is not yet resolved.⁴⁶

40. Phillip, *supra* note 38; Sasha Goldstein, *Suburban St. Louis cop suspended for threatening to kill, pointing gun at media in Ferguson, Mo.*, N.Y. DAILY NEWS (August 20, 2014, 8:54 PM), <http://www.nydailynews.com/news/national/st-louis-area-suspended-threatening-kill-media-ferguson-article-1.1911046>.

41. Agreement at 1, *Hussein v. County of St. Louis, et al.*, No. 4:14-CV-1410-JAR (8th Cir. Aug. 15, 2014).

42. *Id.*

43. Amended Complaint at 1, *Hussein v. County of St. Louis et al.*, No. 4:14-CV-1410-JAR (8th Cir. Nov. 12, 2014).

44. Order by Consent at 1, *Hussein v. County of St. Louis, et al.*, No. 4:14-CV-1410-JAR (8th Cir. Nov. 21, 2014). Note that the quote comes from the injunctions issued against St. Louis County and the Missouri State Highway Patrol. The injunction issued against the Ferguson Police Department contained the same essential message but was more explicit, prohibiting the agency and those within its control from enforcing or threatening to enforce: “any rule, policy, or practice that grants law enforcement officers the authority or discretion to arrest, threaten to arrest, or interfere with any individual, including any member of the media or member of the public photographing or recording in public places unless that person is threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties.”

45. Complaint at 2, *Devereaux, et al. v. County of St. Louis, et al.*, No. 2:15-cv-00023 (8th Cir. Mar. 30, 2015).

46. *Id.*

A. *The Grand Jury Decision and Its Aftermath*

On November 24, 2014, St. Louis County prosecutor Robert McCulloch announced that the grand jury had decided not to indict the officer in the Ferguson shooting.⁴⁷ The announcement triggered a new wave of intense looting and rioting in Ferguson.⁴⁸ Rioters threw rocks and bottles at police, torched one police car and damaged several others, fired gunshots in the air, and set fire to more than a dozen buildings.⁴⁹ The protests quickly spread across the nation, fueled in part by the grand jury's decision and in part by two other well-known cases.⁵⁰

In July 2014, an unarmed African American man named Eric Garner died after being taken to the ground in Staten Island by a white New York City police officer attempting to arrest him for selling loose cigarettes.⁵¹ On November 22, 2014, a white police officer in Cleveland shot and killed a 12-year old African American named Tamir Rice who was holding a toy gun.⁵² On December 3rd, a grand jury in New York City decided not to charge the NYPD officer for Garner's death, further intensifying the growing national protest movement.⁵³ The nationwide protests over these shootings helped fuel the rapid growth of the "Black Lives Matter" movement which was established in 2012 after the death of Trayvon Martin.⁵⁴

In response to these issues, President Barack Obama signed an Executive Order on December 18, 2014, establishing the President's Task Force on 21st Century Policing.⁵⁵ The Task Force was charged with identifying "the best means to provide an effective partnership between law enforcement and local

47. A later investigation by the U.S. Department of Justice reached a similar conclusion. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, MEMORANDUM: DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf; Jeremy Kohler, *Statement of St. Louis Prosecuting Attorney Robert P. McCulloch*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html.

48. Jennifer Pompei, *Inferno! Rioting, fires, looting, break out after decision announced*, WASH. TIMES (Nov. 24, 2014), <http://www.washingtontimes.com/news/2014/nov/24/rioting-breaks-out-in-ferguson-after-grand-jury-cl/?page=all>.

49. *See id.*

50. *See infra* notes 51–52 and accompanying text.

51. Ray Sanchez, *Four Mothers Share Pain of Losing Sons*, CNN (Dec. 12, 2014, 9:12 PM), <http://www.cnn.com/2014/12/12/us/martin-rice-brown-garner-mothers/>.

52. *See id.*

53. Sanchez, *supra* note 51.

54. Sanchez, *supra* note 51.

55. Exec. Order No. 13,684, 3 C.F.R. § 217 (2015).

communities that reduces crime and increases trust.”⁵⁶ It had been nearly 50 years since a U.S. president had appointed a blue ribbon panel to review American policing practices.⁵⁷ The Task Force worked quickly, soliciting testimony from a variety of experts and other stakeholders from across the nation.⁵⁸ In May 2015, the Task Force released its final report to the President.⁵⁹ The report described the philosophical foundation of the Task Force as building trust between police and citizens “so that all components of a community are treating one another fairly and justly and are invested in maintaining public safety in an atmosphere of mutual respect.”⁶⁰ Since the Task Force was established in part due to events in Ferguson, a part of its focus was on policing protests.⁶¹

II. A BRIEF HISTORY OF PROTEST POLICING IN THE UNITED STATES

While the police response to the Ferguson protests shocked the conscience of many Americans, it was consistent with recent shifts in public order policing practices. The strategies and tactics used by police in the U.S. to deal with protests and other public order events have improved considerably in some agencies, but other agencies continue to embrace approaches that are both ineffective and unnecessarily aggressive. In this section, I provide a brief history of protest policing practices in the U.S., from the Civil Rights movement of the 1960s to the events following the shooting of Michael Brown in Ferguson, Missouri in 2014.

Protests have played an important role in stimulating significant social change throughout U.S. history. President Dwight Eisenhower once said that Americans “are descended in blood and in spirit from revolutionaries and rebels -- men and women who dare to dissent from accepted doctrine...”⁶² Ever since the American colonists rebelled against oppressive British rule, protests

56. *Id.*

57. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 8, at 1. In 1965, President Lyndon Johnson established a commission to study crime and law enforcement in the United States. See PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (February 1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [hereinafter THE CHALLENGE OF CRIME].

58. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 8, at 1.

59. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 8, at 1.

60. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 8, at 5.

61. See Part IV *infra*, for a review the Task Force’s recommendations for improving protest policing in the U.S.

62. Dwight D. Eisenhower, 34th President of the U.S., Address at the Columbia University National Bicentennial Dinner, New York City (May 31, 1954), (transcript available at The American Presidency Project), <http://www.presidency.ucs.edu/ws/?pid=9906>

have helped forge the liberty on which the U.S. is founded.⁶³ Although the right to protest is vital in a participatory democracy, governments at all levels have often sought to prevent, disrupt, and otherwise control protests.⁶⁴ As agents of the government, the police have historically played a key role in managing and controlling protests.⁶⁵ While a detailed treatment of the police handling of protests throughout American history is beyond the scope of this article, a brief review of the evolution of protest policing in the U.S. over the past fifty years is instructive for thinking about where we are today.

According to social movement scholars, the dominant approach to protest policing in the 1960s and into the 1970s was the *escalated force* model.⁶⁶ This approach was based on the idea that a dominant show of force by police will convince protesters to comply with their orders.⁶⁷ Accordingly, police must continue to escalate the level of force until they achieve compliance.⁶⁸ The escalated force model has five primary characteristics: a lack of appreciation or respect for protesters' First Amendment rights; an intolerance for community disruption and a tendency for police to equate civil disobedience with anarchy; a minimal level of communication or negotiation between police and protesters; the widespread use of arrest, often under tenuous or legally questionable circumstances, as a means to control protesters; and an over-reliance by police on the use of force.⁶⁹

The escalated force model is based on some questionable assumptions about the psychology of crowds and the people that comprise them.⁷⁰ History has taught us that the premature or ill-advised use of force against protesters, particularly the use of riot control techniques, often amplifies conflict with protesters and can instigate violence.⁷¹ Moreover, the escalated force approach has played a central role in some of our nation's darkest moments, including the police response to protesters in Alabama at the Birmingham civil rights campaign in May 1963 and the "Bloody Sunday" protests in Selma in March 1965; the Orangeburg Massacre in February 1968 in South Carolina; the

63. Jean-Baptiste Velut, *A Tale of Polarizations: Stress, Inertia and Social Change in the New Gilded Age*, in DEMOCRACY, PARTICIPATION AND CONTESTATION: CIVIL SOCIETY, GOVERNANCE AND THE FUTURE OF LIBERAL DEMOCRACY 107 (Emmanuelle Avril & Johann N. Neem eds., 2015).

64. See generally *id.*

65. See generally Velut, *supra* note 63.

66. Clark McPhail, David Schweingruber, & John McCarthy, *Policing Protest in the United States: 1960-1995*, in POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES 50 (Donatella della Porta & Herbert Reiter eds., 1998).

67. See *id.*

68. McPhail et al., *supra* note 66.

69. McPhail et al., *supra* note 66, at 51.

70. See David Schweingruber, *Mob Sociology and Escalated Force: Sociology's Contribution to Repressive Police Tactics*, 41 THE SOC. QUARTERLY 3, 383-84 (2000).

71. McPhail et al., *supra* note 66, at 50.

Chicago Democratic National Convention in August 1968; and the campus demonstrations at Jackson State College in Mississippi in May 1970.⁷² These watershed events raised important questions about the legitimacy of the American police and the limits of freedom for people interested in expressing their views through public protest.⁷³

The heavy-handed police response to protests and other public order events in the U.S. during the 1960s and early 1970s was addressed by four separate presidential commissions.⁷⁴ The President's Commission on Law Enforcement and Administration of Justice, established in July 1965 by President Lyndon B. Johnson, concluded that most of the recent riots in the U.S. had been "touched off by commonplace street encounters between policemen and citizens."⁷⁵ In short, the way any policeman exercises the personal discretion that is an inescapable part of his job can, and occasionally does, have an immediate bearing on the peace and safety of an entire community, or a long-range bearing on the work of all policemen everywhere.⁷⁶

Police must not react to disorder in the course of demonstrations too quickly or with too much force."⁷⁷ The Commission noted that the "tactics chosen at the beginning of disorder may well be the crucial factor in controlling a riot. The kinds and extent of police force employed, and equipment involved, must be thought out well in advance, taught to personnel through training and constantly reassessed."⁷⁸ The Commission acknowledged that preserving order and protecting the constitutional rights of protesters would be easier if "the leaders of protesting or demonstrating groups discussed, in advance with the police, the appropriate times and places for demonstrations and methods of demonstrating."⁷⁹

The National Commission on Civil Disorders, commonly referred to as The Kerner Commission, was established in July 1967. The Kerner Commission concluded that in half of the 24 cities it studied, police actions immediately preceded the outbreak of violence.⁸⁰ Much like the Department of Justice's investigation of the Ferguson Police Department nearly 50 years

72. McPhail et al., *supra* note 66, at 50.

73. *See generally* Part II *supra*.

74. McPhail et al., *supra* note 66, at 55.

75. *See* THE CHALLENGE OF CRIME, *supra* note 57.

76. *See generally* THE CHALLENGE OF CRIME, *supra* note 57.

77. THE CHALLENGE OF CRIME, *supra* note 57, at 118.

78. THE CHALLENGE OF CRIME, *supra* note 57, at 119.

79. THE CHALLENGE OF CRIME, *supra* note 57, at 119.

80. The Advisory Commission's findings are commonly referred to as *The Kerner Report*. NAT'L. ADVISORY COMMISSION ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS v. 3 (1967), <http://www.eisenhowerfoundation.org/docs/kerner.pdf> [hereinafter THE KERNER COMMISSION].

later⁸¹, the Commission noted that “the abrasive relationship between the police and the minority communities has been a major-and explosive-source of grievance, tension and disorder.”⁸² The Commission went on to note that the American police are regularly

“...faced with demands for increased protection and service in the ghetto. Yet the aggressive patrol practices thought necessary to meet these demands themselves create tension and hostility. The resulting grievances have been further aggravated by the lack of effective mechanisms for handling complaints against the police. Special programs for bettering police-community relations have been instituted, but these alone are not enough. Police administrators, with the guidance of public officials, and the support of the entire community, must take vigorous action to improve law enforcement and to decrease the potential for disorder.”⁸³

The Commission recommended that police develop specialized training to prevent civil disorders and control riots.⁸⁴

The National Commission on the Causes and Prevention of Violence (Eisenhower Commission), established in June 1968, found that “the police handling of protesters was often unrestrained and only increased the potential for violence — in the immediate situation and for the future.”⁸⁵ The Commission’s Task Force on Violent Aspects of Protest and Confrontation echoed the findings from other commissions in noting that “the police used uncalled-for force, often vindictively, against protesters, often regardless of whether the latter were ‘peaceful’ or ‘provocative.’”⁸⁶ The Task Force noted that a study of events at the 1968 Democratic National Convention in Chicago revealed

“...unrestrained and indiscriminate police violence on many occasions, particularly at night.... That violence was made all the more shocking by the fact that it was often inflicted upon persons who had broken no law, disobeyed no order, made no threat. These included peaceful demonstrators, onlookers, and large numbers of residents who were simply passing through, or happened to live in, the areas where confrontations were occurring. Newsmen and photographers were singled out for assault and their equipment deliberately

81. See CIVIL RIGHTS DIV., *supra* note 1, at 15.

82. NAT’L ADVISORY COMMISSION ON CIV. DISORDERS, *supra* note 80, at 8.

83. NAT’L ADVISORY COMMISSION ON CIV. DISORDERS, *supra* note 80, at 8.

84. NAT’L ADVISORY COMMISSION ON CIV. DISORDERS, *supra* note 80, at 8.

85. JEROME SKOLNICK, THE POLITICS OF PROTEST: A TASK FORCE REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 245 (1969).

86. See *id.*

damaged. Fundamental police training was ignored; and officers, when on the scene, were often unable to control their men.”⁸⁷

The report of the Commission’s Task Force concluded optimistically that while improper police action could escalate the level of violence, “swift and massive commitment of prudent and well trained law enforcement personnel can usually extinguish a civil disorder in its incipency.”⁸⁸

The President’s Commission on Campus Unrest, commonly referred to as the Scranton Commission, was established in June 1970 after protesters were shot and killed by National Guardsmen at Kent State University in Ohio and by police at Jackson State College in Mississippi.⁸⁹ The Commission’s report concluded that “there have been dangerous and sometimes fatal instances of unnecessary harshness and illegal violence by law enforcement officers.”⁹⁰ We therefore urged that peace officers be trained and equipped to deal with campus disorders firmly, justly, and humanely.⁹¹ They must avoid both uncontrolled and excessive response.”⁹² In the 1960s and early 1970s, the use of the term “police riot” became an increasingly popular shorthand for describing instances in which police instigated or escalated violent confrontations with crowds.⁹³

The failures of the escalated force model led to the emergence of the *negotiated management* model. Using this approach, police negotiate with protesters ahead of time to minimize conflict and reduce the need to use force.⁹⁴ Under the negotiated management model, police respect and even help facilitate the First Amendment rights of protesters.⁹⁵ The police have a greater level of tolerance for disruption, often communicating ahead of time what they will tolerate and what they won’t.⁹⁶ Using the negotiated management style, the police recognize that communication with protesters is necessary to

87. SKOLNICK, *supra* note 85, at 246; *see also* DANIEL WALKER, *RIGHTS IN CONFLICT: THE VIOLENT CONFRONTATION OF DEMONSTRATIONS AND POLICE IN THE PARKS AND STREETS OF CHICAGO DURING THE WEEK OF THE DEMOCRATIC NATIONAL CONVENTION OF 1968* (1968).

88. JAMES S. CAMPBELL, JOSEPH R. SAHID & DAVID P. STANG, *LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 340 (1970).

89. PRESIDENT’S COMMISSION ON CAMPUS UNREST WASHINGTON, D.C., *REPORT OF THE PRESIDENT’S COMMISSION ON CAMPUS UNREST* v, ix, 17–18 (1970), files.eric.ed.gov/fulltext/ED083899.pdf [hereinafter *THE SCRANTON COMMISSION*].

90. *See id.*, at 11.

91. *THE SCRANTON COMMISSION*, *supra* note 89, at 11.

92. *THE SCRANTON COMMISSION*, *supra* note 89, at 11.

93. *See* RODNEY STARK, *POLICE RIOTS: COLLECTIVE VIOLENCE AND LAW ENFORCEMENT* 3 (1972).

94. McPhail et al., *supra* note 66, at 51.

95. McPhail et al., *supra* note 66, at 51.

96. McPhail et al., *supra* note 66, at 52.

achieve mutually agreeable outcomes.⁹⁷ The police and protest groups may each appoint one or more liaisons to communicate on an ongoing basis to minimize the potential for misunderstandings.⁹⁸ Finally, under the negotiated management style, the use of arrest and force as means of controlling protesters is minimized.⁹⁹ Police may even make arrangements ahead of time to arrest those protesters who wish to be arrested as a sign of their commitment to the cause.¹⁰⁰ These arrests are then executed in a peaceful manner and the arrest process is made simple for protesters.¹⁰¹

The negotiated management model was successful in several ways. Social movement researchers believe that the spread of the negotiated management model in the late 1970s and into the 1980s dramatically reduced the frequency and intensity of conflict between police and protesters.¹⁰² The permitting process provided police and other officials with advance notice about planned protests, enabling them to prepare accordingly.¹⁰³ This advance notice removed the element of surprise which, as pointed out by the President's Commission on Law Enforcement and Administration of Justice in 1967, had led to adverse outcomes in the past.¹⁰⁴ The negotiated management model also stimulated communication between police and protesters, giving each side a human face, allowing both sides to state their wishes and expectations, and reducing the likelihood of miscommunications and misunderstandings.¹⁰⁵ More generally, the negotiated management process led to a softer style of policing protests.¹⁰⁶

According to social movement scholars, the negotiated management approach began to fade in the late 1990s as U.S. police began to adopt more aggressive and invasive approaches that have come to be known variously as the *strategic incapacitation model*, the *command and control model*, and the

97. McPhail et al., *supra* note 66, at 52.

98. McPhail et al., *supra* note 66, at 53.

99. McPhail et al., *supra* note 66, at 53–54.

100. See McPhail et al., *supra* note 66, at 53.

101. See McPhail et al., *supra* note 66, at 53.

102. Patrick F. Gillham, Bob Edwards & John A. Noakes, *Strategic Incapacitation and the Policing of Occupy Wall Street Protests In New York City, 2011*, 23 POLICING & SOC'Y 81, 82 (2013); See also John A. Noakes & Patrick F. Gillham, *Police and Protester Innovation Since Seattle*, 12 MOBILIZATION 335 (2007); see also McPhail et al., *supra* note 66.

103. Gillham et al., *supra* note 102, at 82.

104. Patrick F. Gillham, *Securitizing America: Strategic Incapacitation and the Policing of Protest Since the 11 September 2001 Terrorist Attacks*, 5 SOC. COMPASS 636, 638 (2011); see also THE CHALLENGE OF CRIME, *supra* note 57, at 119.

105. See Gillham et al., *supra* note 102, at 82.

106. See Gillham et al., *supra* note 102, at 82.

Miami Model.¹⁰⁷ In some ways these newer approaches resemble the escalated force model of the 1960s, though they each contain certain characteristics that set them apart from earlier approaches and from each other.¹⁰⁸ One explanation for these shifts is that they resulted from the violent confrontations between police and protesters at the 1999 World Trade Organization (WTO) Ministerial Conference in Seattle. During the WTO protests, demonstrators clashed with police, caused millions of dollars in property damage, and succeeded in disrupting the WTO meetings.¹⁰⁹ Police made more than 600 arrests and deployed chemical agents (pepper spray and CS gas) and less lethal munitions (including beanbags and wooden, plastic, and foam baton rounds) against the crowd.¹¹⁰

The governor of Washington declared a state of emergency and mobilized the National Guard to help restore order in the city.¹¹¹ The chaos of the WTO protests came to be known as “the Battle in Seattle.”¹¹² A committee established by Seattle’s City Council to review the episode concluded that:

“[M]embers of the public, including demonstrators, were victims of ill-conceived and sometimes pointless police actions to ‘clear the streets’... Our inquiry found troubling examples of seemingly gratuitous assaults on citizens... by officers who seemed motivated more by anger or fear than professional law enforcement.”¹¹³

Additionally, Seattle Police Chief Norm Stamper, who resigned in the aftermath of the incident, later acknowledged that police (under his command) had over-reacted:

“It was the worst mistake of my career. We used chemical agents, a euphemism for tear gas, against nonviolent and essentially nonthreatening

107. See Gillham et al., *supra* note 102, at 83; see also Alex S. Vitale, *The Command and Control and Miami Models at the 2004 Republican National Convention: New Forms of Policing Protests*, 12 MOBILIZATION 403, 404, 406 (2007).

108. See *infra* notes 136–72 and accompanying text.

109. Gillham, *supra* note 104, at 638.

110. Seattle Police Dep’t., *The Seattle Police Department After Action Report*, in WORLD TRADE ORGANIZATION MINISTERIAL CONFERENCE SEATTLE, WASHINGTON NOV. 29–DEC. 3, 1999 48–49 (Apr. 4, 2000), http://www.seattle.gov/police/publications/wto/wto_aar.pdf [hereinafter WTO After Action Report].

111. Gillham, *supra* note 104, at 638.

112. Jackie Smith, *Globalizing Resistance: The Battle of Seattle and the Future of Social Movements*, 6 MOBILIZATION 1, 1 (2001).

113. REPORT OF THE WTO ACCOUNTABILITY REVIEW COMMITTEE, SEATTLE CITY COUNCIL 1, 4 (Sept. 14, 2000), <http://depts.washington.edu/wtohist/documents/arcfinal.pdf>.

protesters. The natural consequence of which [is] that we were the catalyst for heightened tension and conflict rather than peacekeepers.”¹¹⁴

Stamper concluded that the police response to protesters heightened tensions rather than de-escalating them, noting that “a whole lot of others would not have acted as they did if we didn’t act as we did.”¹¹⁵ After stepping down as Chief, Stamper went on to become a vocal critic of the excessive militarization of police agencies and the overly aggressive police response to protests and other public order events.¹¹⁶

However, for some police leaders, the Seattle protests exposed the weaknesses of the negotiated management model, showing just how quickly and easily protests could get out of hand.¹¹⁷ They viewed the Seattle incident as “the kind of situation they needed to retrain and retool for so that it did not occur in their city, on their watch.”¹¹⁸ Just as the tragedy at Columbine High School became the pivotal event that reshaped the police response to active shooter situations, the Seattle WTO protests had a profound effect on the policing of protests in the U.S. and beyond.¹¹⁹

The issues that arose in Seattle were also heavily influenced by the growing anti-globalization movement.¹²⁰ Meetings of major international bodies (like the G-8, the International Monetary Fund, the World Bank, the World Economic Forum, the World Trade Organization, and others) had begun to attract seasoned activists (often referred to by police as “professional protesters”) from all over the world. Radical activist groups had begun to reject the negotiated management model and the “choreographed demonstrations” that resulted from the permitting process.¹²¹ According to one social movement scholar, “activists complained that demonstrations orchestrated with the police were overly accommodating and ineffectual for promoting their goals.”¹²²

Radical activists “refused to use ‘contained’ or familiar and undisruptive tactics and instead engaged in ‘transgressive’ or innovative confrontational tactics...”¹²³ The activists’ rebellion against negotiated management was

114. Amanda Taub, *Seattle’s Former Police Chief Speaks out on Ferguson and Police Militarization*, VOX (Aug. 14, 2014, 2:15 PM), <http://www.vox.com/2014/8/14/6002451/ferguson-police-militarization-seattle>.

115. Maria L. La Ganga, *Seattle Police Chief During WTO Unrest Appalled by Ferguson Violence*, L.A. TIMES (Aug. 16, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-for-mer-seattle-police-chief-reacts-to-ferguson-20140815-story.html>.

116. Taub, *supra* note 114.

117. See Gillham et al., *supra* note 102, at 335.

118. See Gillham et al., *supra* note 102, at 335.

119. See Gillham et al., *supra* note 102, at 335.

120. See Gillham et al., *supra* note 102, at 335.

121. Gillham, *supra* note 104, at 639.

122. Gillham, *supra* note 104, at 639.

123. Gillham, *supra* note 104, at 639.

facilitated by the use of communication technologies.¹²⁴ One scholar referred to the Seattle WTO protests as “the first wired mass demonstration.”¹²⁵ Organizers used the internet and email to plan and coordinate the protests.¹²⁶ Once the protests were already underway, mobile devices like cell phones and pagers were used to help organizers “move demonstrators, block streets, and coordinate protesters.”¹²⁷ The use of these technologies in Seattle facilitated the emergence of more efficient “swarming” tactics in which protesters could outmaneuver police, mobilizing in a particular location very quickly and then dispersing just as quickly once police arrived.¹²⁸

Changes in the way police handle protests and other public order events were also influenced by the dramatic shifts that occurred in American policing after the terrorist attacks on American soil on September 11, 2001.¹²⁹ The attacks came at a time when police departments in the U.S. were still modifying their approaches to public order events in response to the Seattle WTO protests.¹³⁰ After 9/11, in addition to dealing with crime, disorder, traffic, and other mostly local issues, American police became a more integral part of the nation’s homeland security network. While counterterrorism had often been viewed as a federal responsibility, 9/11 served as a potent reminder that “responsibility for establishing the front line of defense in America’s cities and towns falls most heavily on state and local police.”¹³¹

Intelligence units that had been dismantled or scaled back in the 1970s after the COINTELPRO scandal and other similar events were reactivated.¹³² The U.S. military funneled surplus equipment, including armored vehicles and weaponry, to state and local police departments, igniting a debate over the militarization of American policing.¹³³ Police officials began to wonder

124. See William Briggs, *Sea Turtles, Cell Phones, and the WTO*, 17 COMM. WORLD 13, 15 (2000).

125. See *id.* at 15.

126. Briggs, *supra* note 124, at 15.

127. Briggs, *supra* note 124, at 15.

128. Jack L. Qiu, *Mobile Communication and Social Movements*, in *ENCYCLOPEDIA OF SOC. MOVEMENT MEDIA* 335, 336 (John D.H. Downing ed., 2011).

129. See Gillham, *supra* note 104, at 637.

130. See Gillham, *supra* note 104, at 639.

131. Edward R. Maguire & William R. King, *Federal-Local Coordination in Homeland Security*, in *CRIMINOLOGISTS ON TERRORISM AND HOMELAND SECURITY* 322, 333 (Brian Forst et al. eds., 2011).

132. Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 ASIAN AM. L.J. 35, 47 (2012) (noting the institution of Joint Terrorism Task Forces (“JTTF”) squads directed by FBI field offices to prevent terrorism).

133. Radley Balko, *How did America’s Police Become a Military Force on the Streets?*, A.B.A. JOURNAL (July 1, 2013), http://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_on_the_streets. But see David A. Klingler & Dave Grossman,

whether the chaos and disorder surrounding protests and other public order events might attract terrorists intent on causing death and destruction.¹³⁴ As the perceived threat level posed by these events increased, the police adjusted their approaches accordingly, reverting in some ways to the more aggressive approaches that predated the negotiated management era.¹³⁵

Social movement scholars have argued that since the 1999 Seattle WTO protests and the 2001 terrorist attacks, U.S. police agencies have shifted away from negotiated management and toward a newer approach called *strategic incapacitation*.¹³⁶ This approach is characterized by a sense of disrespect for the exercise of First Amendment rights, an intolerance for community disruption, an unwillingness to communicate or negotiate with protesters, the use of arrests and force as primary methods for controlling protests, intensified efforts to control access to space, surveillance of protesters, and greater information sharing between law enforcement agencies.¹³⁷ The spread of strategic incapacitation methods for dealing with protests has led to intense criticism of the police in some cities, with a particular focus in the U.S. on the constitutionality of these practices.¹³⁸

Other scholars divide these newer approaches to protest policing in the U.S. into two categories: the *command and control model*, and the *Miami model*.¹³⁹ While both are considered substantially more aggressive and invasive than negotiated management, the command and control model is sometimes referred to as the “soft hat” approach, while the Miami model is referred to as the “hard hat” approach.¹⁴⁰ The command and control model emphasizes “the micromanagement of all aspects of demonstrations” including the use of very restrictive permitting processes; intense efforts to control public space through the use of barricades, police lines, and other mechanisms to surround, subdivide, and direct the flow of protesters; and “a willingness to use force against even minor violations of the law.”¹⁴¹ The command and control model is based on the view that protests are inherently disorderly and must

Who Should Deal with Foreign Terrorists on US Soil? Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America, 25 HARV. J.L. & PUB. POL’Y 815 (2002); Peter B. Kraska, & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997).

134. See generally Balko, *supra* note 133.

135. See Gillham, *supra* note 104, at 637, 639.

136. See Gillham, *supra* note 104, at 637, 639.

137. Patrick F. Gillham & John A. Noakes, ‘More than a March in a Circle’: *Transgressive Protests and the Limits of Negotiated Management*, 12 MOBILIZATION 341, 343 (2007).

138. See Gillham & Noakes, *supra* note 137, at 349; see also Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 UDC L. REV. 53 (2004).

139. Vitale, *supra* note 107, at 406.

140. Vitale, *supra* note 107, at 406.

141. Vitale, *supra* note 107, at 405.

therefore be tightly controlled to avoid more serious problems.¹⁴² It is consistent with the application of an order maintenance or “broken windows” style of policing to protests and other public order events.¹⁴³

The Miami model got its name from the response of the Miami area police to protests that occurred during the negotiations of the Free Trade Area of the Americas (FTAA) agreement in 2003.¹⁴⁴ With police expecting trouble from anarchists, approximately 2,500 police officers in riot gear were deployed to the area from more than three dozen agencies.¹⁴⁵ Police organized an overwhelming show of force and behaved aggressively toward protesters in their efforts to secure downtown Miami.¹⁴⁶ Opinions differed about how well the police handled the protests, with Miami Mayor Manny Diaz characterizing the police response as “a model for homeland security,”¹⁴⁷ and a circuit court judge who observed the protests referring to police actions as “a disgrace for the community.”¹⁴⁸ An investigative panel convened by the City of Miami noted that officers were not prepared to handle “the intermingling of peaceful demonstrators with violent protesters” and recommended that the Miami Police Department train its officers on First Amendment rights.¹⁴⁹ In the aftermath of the FTAA protests, the City of Miami and several other local governments agreed to legal settlements in excess of \$1.5 million as result of alleged constitutional violations by police.

The Miami model is characterized by an aggressive, militarized approach to protest control, including “the creation of no protest zones, heavy use of less lethal weaponry, surveillance of protest organizations, negative advance publicity by city officials of protest groups, preemptive arrests, preventive detentions, and extensive restrictions on protest timing and locations.”¹⁵⁰ It is referred to as the “hard hat” approach because it involves deploying officers in

142. See Vitale, *supra* note 107, at 405–06.

143. Alex S. Vitale, *From Negotiated Management to Command and Control: How the New York Police Department Polices Protests*, 15 *POLICING AND SOC’Y* 283, 284 (2005).

144. Vitale, *supra* note 107, at 406.

145. *Police, Protesters Clash Near Miami Trade Talks*, CNN (Nov. 20, 2003), <http://www.cnn.com/2003/US/South/11/20/miami.protests>.

146. See *id.*

147. Michelle Goldberg, *This is not America*, SALON (Dec. 16, 2003), http://www.salon.com/2003/12/17/miami_police/.

148. Associated Press, *Miami Judge Questions Police Action at Free Trade Demonstrations*, THE ST. AUGUSTINE REC. (Dec. 21, 2003), http://staugustine.com/stories/122103/sta_2013242.shtml#.VRGr6WetG70.

149. CITY OF MIAMI CIVILIAN INVESTIGATIVE PANEL, REPORT ON THE FREE TRADE AREA OF THE AMERICAS SUMMIT (July 20, 2006), http://www.miamigov.com/cip/downloads/FTAA_Report.pdf.

150. Alex S. Vitale, *Policing Protests in New York City*, in *URBANIZATION, POLICING AND SECURITY: GLOBAL PERSPECTIVES*, 275, 279 (Gary Cordner et al. eds., 2009).

full riot gear.¹⁵¹ The Miami model tends to be used for more transgressive (confrontational, subversive, or destructive) protesters or groups that are viewed by police as unable to be controlled through negotiated management or command and control approaches.¹⁵² The Miami model relies on riot control techniques which are warranted under certain circumstances, such as rioting, looting, and violence.¹⁵³ However, the use of these methods against peaceful protesters is unwarranted and has often resulted in costly civil settlements.¹⁵⁴

The newer approaches to protest policing discussed in this section – the strategic incapacitation model, the command and control model, and the Miami model – are more aggressive and invasive than the negotiated management model.¹⁵⁵ For proponents, these new approaches are necessary to confront the violence and disorder associated with transgressive protesters who are unwilling to obey the law or cooperate with police in arranging mutually beneficial solutions.¹⁵⁶ For critics, these new approaches represent a significant threat to free democratic expression and other foundational rights that are guaranteed in the U.S. Constitution.¹⁵⁷ These newer approaches have also led to costly legal settlements with protesters, journalists, and innocent bystanders who allege that police violated their constitutional rights.¹⁵⁸

The shift toward more aggressive approaches became evident in several U.S. cities during the Occupy movement in 2012 and 2013.¹⁵⁹ The Occupy movement has been called the “most significant social movement to utilize transgressive protest tactics in the U.S. in the last 40 years.”¹⁶⁰ It emerged very suddenly, with Occupy protesters establishing encampments in parks and other public areas, often violating laws and regulations governing the use of these spaces.¹⁶¹ Protesters exercised their First Amendment rights loudly and often disruptively, routinely defying requests from police and local government officials to secure permits or follow pre-established routes during protest

151. See Vitale, *supra* note 107, at 406.

152. See Vitale, *supra* note 107, at 406; see also Gillham, *supra* note 104, at 639.

153. See generally Vitale, *supra* note 107.

154. See generally Vitale, *supra* note 107.

155. See generally Vitale, *supra* note 107.

156. See Vitale, *supra* note 107, at 406.

157. See Gillham & Noakes, *supra* note 137, at 349.

158. See Gillham & Noakes, *supra* note 137, at 349.

159. See Adam Gabbatt & Karen McVeigh, *Occupy Wall Street: Dozens Arrested on One-Year Anniversary*, THE GUARDIAN (Sept. 17, 2012, 12:56 PM), <http://www.theguardian.com/world/2012/sep/17/occupy-wall-street-arrests-anniversary>; see also Jeff Madrick, *The Fall and Rise of Occupy Wall Street*, HARPER’S MAGAZINE (Mar. 2013), <http://harpers.org/archive/2013/03/the-fall-and-rise-of-occupy-wall-street/?single=1>.

160. Gillham et al., *supra* note 102, at 81.

161. Gillham et al., *supra* note 102, at 84; see also Nathaniel Botwinick, *Occupy Wall Street Blotter*, NAT’L REV. (May 2, 2012), <http://www.nationalreview.com/node/282993/print>.

marches.¹⁶² Occupiers openly challenged the authority of the police in many jurisdictions, engaging in mostly peaceful acts of civil disobedience.¹⁶³ Police leaders struggled to address the many challenges posed by the Occupy movement, with some choosing to respond forcefully and decisively.¹⁶⁴ As a result, images of “mass arrests, riot gear clad police, pepper spraying of demonstrators, and the use of tear gas and concussion grenades became commonplace in the U.S. in the fall of 2011.”¹⁶⁵ Viral photos and videos showing police behaving abusively toward peaceful but noncompliant protesters generated substantial legitimacy costs for the American police.¹⁶⁶

Though some police agencies responded aggressively to the Occupy movement, others responded in a professional, thoughtful, empathetic, and creative manner to facilitate the First Amendment rights of Occupy protesters to assemble and express their views peacefully.¹⁶⁷ In some cities, police continued to rely on negotiated management approaches, working together with protesters to find mutually agreeable solutions.¹⁶⁸ In Salt Lake City, for example, police went to great lengths to preserve relationships and minimize conflict between police and protesters under the direction of Chief Chris Burbank.¹⁶⁹ The Occupy movement arrived at a time when the most appropriate means of handling protests and other public order events was still contested.¹⁷⁰ For some agencies, negotiated management had run its course and was eclipsed by newer approaches like strategic incapacitation, command and control, and/or the Miami model. Some had already tested out these new approaches and were forced to reconsider them when protesters prevailed in injunctions, lawsuits, and settlements against the police for violating their

162. Gillham et al., *supra* note 102, at 89.

163. *Occupy Protests: ‘Civil Disobedience Will Not Be Tolerated’*, WSMV-TV NASHVILLE (last updates Jan. 10, 2012 2:15 PM), <http://www.wsmv.com/story/15677969/occupy-protests-civil-disobedience-will-not-be-tolerated>.

164. Gillham et al., *supra* note 102, at 94.

165. Alex S. Vitale, *Managing Defiance: The Policing of the Occupy Wall Street Movement*, Guest Lecturer for the Vera Institute of Justice, New York’s “Occupy Wallstreet” Event, (Feb. 15, 2012) <http://politicsandprotest.ws.gc.cuny.edu/files/2012/07/PPW-4-Vitale.docx>.

166. Conor Friedersdorf, *14 Specific Allegations of NYPD Brutality During Occupy Wall Street*, THE ATLANTIC (Jul. 25, 2012), <http://www.theatlantic.com/politics/archive/2012/07/14-specific-allegations-of-nypd-brutality-during-occupy-wall-street/260295/>.

167. Dylan Scott, *Occupy Salt Lake City Ends Peacefully*, GOVERNING (Apr. 2012), <http://www.governing.com/topics/public-justice-safety/gov-occupy-salt-lake-city-ends-peacefully.html>.

168. *See id.*

169. Scott, *supra* note 167.

170. *See generally* Andy Kroll, *Mayors and Cops Traded Strategies for Dealing With Occupy Protesters*, MOTHER JONES (Nov. 16, 2011, 10:50 AM), <http://www.motherjones.com/mojo/2011/11/occupy-protest-coordinate-crackdown-wall-street> (highlighting the uncertainty and instability of policing procedures across the country at the onset of the Occupy movement).

constitutional rights. For others, negotiated management was still a viable approach under most conditions.

After the death of Michael Brown in August 2014, police responded in an aggressive and militaristic manner to the intense protests that occurred in and around Ferguson. Once again the evening news featured police officers in riot gear, repeatedly deploying chemical agents and less lethal munitions at peaceful protesters and journalists. While many observers were surprised, the police response to the protests and civil unrest in Ferguson was consistent with recent shifts in public-order policing practices in the U.S. These shifts have proven costly for many cities. In January, 2014, New York City agreed to pay \$18 million to settle dozens of lawsuits associated with wrongful arrests during protests outside the 2004 Republican National Convention.¹⁷¹ In 2012, the City of Chicago agreed to pay \$12 million to settle lawsuits associated with the wrongful arrests of more than 900 protesters at a 2003 march against the war in Iraq.¹⁷² In 2010, Washington, DC agreed to pay \$13.7 million to settle a class-action lawsuit by people wrongfully arrested at a 2000 protest near the World Bank and the IMF.¹⁷³ In 2009, the City of Los Angeles agreed to pay nearly \$13 million to settle several lawsuits associated with the use of excessive force by police at a 2007 May Day rally.¹⁷⁴ While some agencies have come a long way in developing more thoughtful and restrained public order policing strategies, others continue to rely on approaches that are reminiscent of those used during the Civil Rights movement in the 1960s.

III. LESSONS FROM RESEARCH

This section outlines some basic concepts and principles from two bodies of social science research that provide a useful foundation for thinking about protest policing strategies. First, I examine theory and research on the psychology of compliance and defiance. Fair and effective protest policing strategies encourage people to comply voluntarily with police and the law. Unfair and ineffective protest policing strategies run the risk of instigating

171. Erin Durkin & Daniel Beekman, *City Pays \$18 Million to Settle Lawsuits Stemming from 2004 Republican National Convention at Madison Square Garden*, N.Y. DAILY NEWS (Jan. 15, 2014, 10:50 PM), <http://www.nydailynews.com/new-york/city-pays-18m-settle-rnc-lawsuits-article-1.1581416>.

172. Hal Dardick, *Aldermen Settle Iraq War Protest Lawsuits for \$12 Million*, CHI. TRIB. (June 6, 2012), http://articles.chicagotribune.com/2012-06-06/news/chi-aldermen-settle-iraq-war-protest-lawsuits-for-12-million-20120606_1_protest-aldermen-police-conduct.

173. Maria Glod, *D.C. Agrees to \$13.7 Million Settlement in 2000 Mass Arrest*, WASH. POST (July 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005200.html>.

174. Maevie Reston & Joel Rubin, *Los Angeles to Pay \$13 Million to Settle May Day Melee Lawsuits*, L.A. TIMES (Feb. 5, 2009), <http://articles.latimes.com/2009/feb/05/local/me-lapd-settlement5>.

defiance or rebellion, thus potentially worsening matters. Second, I examine theory and research on crowd psychology and its implications for public order policing. Developing fair and effective approaches to public order policing requires a clear understanding of how crowds function. Unfortunately, some of the strategies and tactics used commonly in policing protests are based on fundamental misconceptions about crowd psychology. As a result, these approaches often make things worse, not better.

A. The Psychology of Compliance and Defiance

A key challenge in policing protests and other public order events fairly and effectively is securing voluntary compliance with the law and its agents without triggering or amplifying people's sense of defiance and rebellion. A long tradition of scientific research has examined why people choose to obey the law or follow the directives of legal authorities like the police. The findings from this research are instructive for thinking about how to police protests fairly and effectively.

One of the most common explanations for why people obey the law and legal authorities is that the costs of not doing so usually outweigh the benefits. This is the basic premise behind *deterrence theory*, which posits that the certainty, severity, and swiftness of punishment influences people's decisions to obey the law or legal authorities.¹⁷⁵ Recently, criminologists have begun to embrace an alternative explanation for compliance that focuses instead on the extent to which people view the law and legal authorities as fair and legitimate. Two of the central concepts from this body of scholarship – *procedural justice* and *legitimacy* – were featured prominently in the recent report issued by the President's Task Force on 21st Century Policing.¹⁷⁶

Procedural justice is concerned with how people perceive the fairness of the procedures used by an authority figure. It is typically viewed as having two components: the quality of treatment and the quality of decision making. In policing, the quality of treatment is concerned with the nature of the interpersonal interaction between a police officer and a citizen, such as whether the officer treated the citizen in a fair, polite, and respectful manner. The quality of decision-making is concerned with the fairness of the procedures used by an officer in making discretionary decisions such as whether to make a stop, conduct a search, issue a citation, make an arrest, or use force. During their encounters with police officers, citizens routinely make judgments about the quality of treatment and quality of decision-making exhibited by the officer. As I demonstrate shortly, these judgments have important consequences.

175. Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010).

176. See INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 6, 14.

People's judgments about the fairness of the outcomes they receive (such as a stop, search, citation, or arrest) are often separate from their judgments about the procedures used to reach those outcomes. Judgments about the fairness of outcomes are associated with *distributive justice*, while judgments about the fairness of processes and procedures are associated with *procedural justice*. Thus, people may be upset that they were arrested (a distributive justice judgment) while also viewing the behavior of the officer who made the arrest as fair and respectful (a procedural justice judgment). This distinction is especially important for police because it suggests that even when officers must deliver unfavorable outcomes like issuing a citation, making an arrest, or using force, they can still leave people with the perception that the officer behaved in a procedurally just manner.

Procedural justice focuses specifically on judgments about the interaction between an authority figure and someone who is subject to that authority (such as a police officer and a citizen). Legitimacy, on the other hand, focuses on broader judgments about institutions such as the police, the law, or the government. Although the meaning of legitimacy is currently being debated by scholars, it is generally concerned with whether the authority exerted by an institution is rightful, proper, or appropriate.¹⁷⁷ When the police are viewed as corrupt, brutal, or inept, citizens are unlikely to view them as legitimate sources of authority. In the U.S., several recent use of force incidents have led to a substantial legitimacy crisis in policing, particularly in minority communities.

The importance of procedural justice and legitimacy hinges on the relationship between them. Research evidence suggests that people's perceptions of procedural justice influence their judgments about the legitimacy of law and legal authorities.¹⁷⁸ Thus, when people view the police as behaving in a procedurally just manner, they are more likely to view the police, and the criminal law more generally, as legitimate sources of authority. In such instances, they are more likely to comply with the law and its agents. This chain of relationships is referred to as the *process-based model of regulation*. It suggests that by behaving in a fair and respectful manner during interactions with citizens, police officers can enhance the perceived legitimacy of the police and the law. This, in turn, influences people's decisions to obey the law and legal authorities. The inverse of this argument is also true. When police officers treat citizens in a manner that is perceived as procedurally

177. Devon Johnson, Edward R. Maguire, & Joseph B. Kuhns, *Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean*, 48 LAW & SOC'Y REV. 947, 948-49 (2014); Justice Tankebe, *Viewing Things Differently: Examining the Dimensions of Public Perceptions of Police Legitimacy*, 51 CRIMINOLOGY 103 (2013).

178. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 6 (1990).

unjust, the police and the law are viewed as less legitimate, and people are less likely to comply.

The process-based model of regulation serves as an alternative to deterrence theory, which suggests that people comply with the law and its agents to avoid punishment.¹⁷⁹ The process-based model is appealing because it suggests that authority figures should treat people fairly, not only because it is the right thing to do, but because it works. This perspective emerges from a more general body of research which demonstrates that when people perceive the law or legal authorities as illegitimate, abusive, or unfair, they are more likely to rebel or become defiant.¹⁸⁰ The process-based model has powerful implications for the policing of protests. When police attempt to exert control over protesters in a procedurally unjust manner, they can actually trigger a defiant or rebellious response in which protesters engage in even greater law-breaking than if the police had not intervened at all. Thus, it is in the best interest of authority figures to behave in ways that preserve or enhance perceptions of legitimacy.

A recent study of protesters reinforces these ideas. The study examined attitudes toward the use of violence against police among Occupy DC protesters. Findings from a survey of 136 Occupy DC participants revealed that some participants embraced the use of violence against police. More specifically, the study found that “31.5% of respondents find it reasonable to use minor forms of violence against police (pushing or shoving them), 16.9% find it reasonable to use moderate forms of violence (hitting or kicking them), and 10.9% find it reasonable to use severe forms of violence (throwing harmful objects or using a weapon against them).”¹⁸¹

The study sought to determine why some protesters were more willing than others to use violence against police to accomplish their objectives. The findings revealed that the most important factor in explaining people’s willingness to use violence against police was their perception of the extent to which the police behave in a procedurally unjust manner. The effects of procedural justice were stronger than all other explanatory variables, including race. When protesters believe the police behave in a procedurally unjust manner, they are significantly more likely to support the use of violence against the police. Thus, in addition to the fact that procedurally just strategies

179. *See id.*; *see also* Tom R. Tyler, Stephen J. Schulhofer & Aziz Huq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 *LAW AND SOC’Y REV.* 365 (2010).

180. L. W. Sherman, *Defiance, Compliance, and Consilience: A General Theory of Criminology*, in *THE SAGE HANDBOOK OF CRIMINOLOGICAL THEORY* 360, 363 (Eugene McLaughlin & Tim Newburn eds., 2010).

181. Edward R. Maguire, Maya Barak, Karie Cross, & Kris Lugo, *Attitudes Toward Violence Among Occupy DC Participants* (2015) (Unpublished paper) (on file with authors).

and tactics are likely to be more successful in encouraging law-abiding behavior, these approaches may also improve officer safety.

B. Crowd Psychology

Public order policing strategies and tactics are often based, either implicitly or explicitly, on theories of crowd behavior. Police officials who deal with crowds on a regular basis often have deeply felt theories about how crowds function. These theories inform their decisions about the most appropriate strategies and tactics for dealing with crowds. Unfortunately, some of these theories – and the strategies and tactics that flow from them – are based on antiquated perspectives in crowd psychology that have long been discredited. When police strategies and tactics are based on inaccurate assumptions about how crowds function, these approaches can stimulate more conflict than they prevent, endangering both crowds and the police. Thus, it is instructive to review some basic ideas from crowd psychology and their implications for policing protests and other public order events.

The “classic perspective” on crowd psychology was articulated by Gustave Le Bon, a French scholar whose 1895 book, *The Crowd: A Study of the Popular Mind*,¹⁸² has been called “one of the most influential books” ever written in social psychology.¹⁸³ Le Bon argued that crowds take on a life of their own, quite different from the individuals that comprise them. Moreover, individuals within a crowd begin to lose their individual identities and the capacity for individual decision-making as they become mesmerized by the magnetic and irresistible influence of the crowd. According to Le Bon, the characteristics and backgrounds of the individuals in a crowd do not really matter. All individuals in a crowd are subject to the contagious ideas of the larger crowd. LeBon states,

“The most striking peculiarity presented by a psychological crowd is the following: Whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character, or their intelligence, the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think, and act in a manner quite different from that in which each individual of them would feel, think, and act were he in a state of isolation.”¹⁸⁴

According to LeBon, although crowds are composed of people with different backgrounds, thoughts, and perspectives, crowds quickly become

182. See GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* (1896) (Although the book was published in French in 1895, the first English translation was not available until 1896).

183. SUSAN HERBST, *RUDE DEMOCRACY: CIVILITY AND INCIVILITY IN AMERICAN POLITICS* 36 (2010).

184. LE BON, *supra* note 182, at 4.

homogeneous as a result of social contagion effects in which thoughts, feelings, and ideas diffuse throughout the crowd. Through this process, LeBon notes, an individual in a crowd “is no longer himself, but has become an automaton who has ceased to be guided by his will.”¹⁸⁵ LeBon’s view of crowds is intensely pessimistic; he refers to them as barbarians and notes that they “are only powerful for destruction.”¹⁸⁶ The classical view of crowds that he espouses treats them as unreasonable, unruly, and dangerous, thus providing an implicit justification for the use of repressive crowd control measures.¹⁸⁷ However, according to leading crowd psychology scholars, the classical view is “not only wrong, but dangerously wrong.”¹⁸⁸

The classical view of crowds, along with similar perspectives that emerged later, is premised on the idea that people in a crowd lose their individual identity and consequently lose control over their own behavior.¹⁸⁹ An alternative perspective comes from *social identity theory*, which is based on the idea that people’s social identities are associated with the contexts in which they are embedded and the groups with which they associate. Social identity refers to “the way in which people understand how they are positioned relative to others.”¹⁹⁰ People are typically associated with more than one social group and therefore have multiple social identities, each having its own level of depth and intensity.¹⁹¹ Moreover, people tend to be more heavily influenced by those with similar social identities than by those with whom they have little in common.¹⁹² Understanding the various social identities of people involved in protests and other public order events is crucial for developing fair and effective approaches for policing these events.¹⁹³

185. LE BON, *supra* note 182, at 8.

186. LE BON, *supra* note 182, at xiii.

187. Stephen Reicher, *The Psychology of Crowd Dynamics*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 182–208 (Michael A. Hogg & R. Scott Tindale eds., 2008).

188. Stephen Reicher, Clifford Stott, Patrick Cronin & Otto Adang, *An Integrated Approach to Crowd Psychology and Public Order Policing*, 27 POLICING: AN INT’L J. POLICE STRATEGIES & MGMT. 558, 565 (2004).

189. John Drury & Stephen Reicher, *Collective Psychological Empowerment as a Model of Social Change: Researching Crowds and Power*, 65 J. SOC. ISSUES 707, 709 (2009).

190. *See id.* at 712.

191. Drury & Reicher, *supra* note 189, at 715 n.3.

192. *See* Eric Jaffe, *If Cops Understood Crowd Psychology, They’d Tone Down the Riot Gear*, FAST CO. & INC. (Aug. 27, 2014, 7:30 AM), <http://www.fastcodesign.com/3034902/evidence/if-cops-understood-crowd-psychology-theyd-tone-down-the-riot-gear>.

193. *See id.*

The conventional view of social identities held that they have some level of permanence; they may not last forever, but they are also not fleeting.¹⁹⁴ Over time, this conventional view of social identities gave way to the *elaborated social identity model* (ESIM) which allows for the possibility of temporary shifts in people's social identity as a result of the location or situation in which they find themselves.¹⁹⁵ ESIM provides a powerful framework for understanding crowd psychology, and more specifically, crowd conflict.¹⁹⁶ Crowds are heterogeneous and contain multiple subgroups, each with different norms and values.¹⁹⁷ For example, most protests attract a wide range of participants from different walks of life.¹⁹⁸ People belonging to these different subgroups may have different social identities and different behavioral norms.¹⁹⁹ They don't *lose* their identity in the ways outlined by LeBon, but they do take on *different* social identities when they become part of a crowd.²⁰⁰ A central aspect of the ESIM perspective is the notion that in crowds, people's social identities can be heavily influenced by the behavior of outsiders, especially the police.²⁰¹

One way that crowd psychologists learn about crowd dynamics is by observing behavioral patterns at crowd events.²⁰² Studies of different types of crowd events have discovered similar patterns:

"Events would start with a heterogeneous crowd, the majority of which identified themselves as moderates who simply wanted to express their view to the authorities, and a minority of whom were radical and saw the authorities as an antagonist. However, crowd members were perceived as homogeneously dangerous by the authorities (notably the police) and treated as such—that is denied the ability to express themselves as they wished. This then led to a radicalization among moderate crowd members who then joined with the radicals in challenging the police. Not only that, but they came to change their

194. See generally John Drury & Steve Reicher, *Collective Action and Psychological Change: The Emergence of New Social Identities*, 39(4) *British Journal of Social Psychology* 579 (Dec. 2000).

195. See generally Reicher, *supra* note 187; Reicher et al., *supra* note 188; Drury & Reicher, *supra* note 189.

196. Bell, *supra* note 195 (noting that ESIM is based on the premise that people in a crowd shift from individual identities to group identities).

197. Drury & Reicher, *supra* note 189, at 713.

198. Eric Treider, *Protesters at Town Square Came From All Walks of Life*, ALASKA DISPATCH NEWS (Oct. 27, 2011), <http://www.adn.com/article/20111027/protesters-town-square-came-all-walks-life>.

199. Drury & Reicher, *supra* note 194; S. LAUREL WELDON, *PROTEST, POLICY, AND THE PROBLEM OF VIOLENCE AGAINST WOMEN: A CROSS-NATIONAL COMPARISON* 71–72 (2002).

200. Drury & Reicher, *supra* note 194.

201. Drury & Reicher, *supra* note 189, at 713.

202. Drury & Reicher, *supra* note 189, at 712.

views about the authorities and hence about their own identity in relation to the authorities.”²⁰³

When police treat entire crowds as if they are dangerous and indiscriminately deny participants the opportunity to express themselves, the police may inadvertently lead moderate members of the crowd to align with more radical members against the police.²⁰⁴ Moderates enter protests and other types of crowd events with one sense of identity, and through their interactions with or observations of police, may take on a different social identity.²⁰⁵ This idea that police can inadvertently alter the social identities of people in crowds is central to the ESIM perspective.²⁰⁶

According to crowd psychologists, one of the conditions responsible for generating conflict and violence in crowds is when there are discrepancies in the way events are viewed by insiders (crowd participants) and outsiders (such as the police).²⁰⁷ This occurs, for example, when protest participants view themselves as engaging in peaceful and constitutionally protected behavior and police view them as a threat to public order or public safety.²⁰⁸ Another condition that can trigger conflict is the tendency for police to view crowds as homogeneous and to adopt strategies and tactics “which impose a common fate on all crowd members.”²⁰⁹ This condition often becomes a self-fulfilling prophecy in which people thought to be disorderly and unruly become significantly more defiant and rebellious in response to shared perceptions about the way the police treat them.²¹⁰

One of the most important insights of the ESIM perspective is that ill-advised actions by police can instigate or escalate conflict and violence in crowds.²¹¹ When crowd participants view themselves as engaging in lawful and constitutionally protected behavior, and they view the police as engaging in indiscriminate and illegitimate enforcement actions, then the whole crowd “will unite around a sense of opposition to the police and the authorities they are protecting.”²¹² They will experience an increased willingness to defy, rebel against, or use violence against the police.²¹³ This is one of the key areas of overlap between crowd psychology and the notions of procedural justice and

203. Drury & Reicher, *supra* note 189, at 713.

204. Drury & Reicher, *supra* note 189, at 712.

205. Drury & Reicher, *supra* note 189, at 712.

206. Drury & Reicher, *supra* note 189, at 712.

207. Drury & Reicher, *supra* note 189, at 712–13.

208. Drury & Reicher, *supra* note 189, at 713.

209. Drury & Reicher, *supra* note 189, at 713.

210. Drury & Reicher, *supra* note 189, at 713.

211. Drury & Reicher, *supra* note 189, at 712.

212. Drury & Reicher, *supra* note 189, at 713.

213. Drury & Reicher, *supra* note 189, at 713.

legitimacy presented earlier.²¹⁴ Furthermore, those who viewed themselves initially as moderates will come to reconsider their views of the police.²¹⁵ When the police treat moderate crowd members as radicals, the moderates begin to identify with the radicals to a much greater extent than they did before.²¹⁶ Support for challenging or pushing back against the police can spread quickly under such conditions.²¹⁷ However, this escalation process is not inevitable.²¹⁸ Based on the principles of the ESIM perspective, police can develop thoughtful public order policing strategies that prevent and de-escalate conflict rather than inadvertently triggering or escalating it.²¹⁹

Most of the research on ESIM and its applications to policing has been carried out in Europe.²²⁰ The ESIM perspective serves as the foundation for recent reforms in policing protests and other public order events in several Western European nations.²²¹ For example, after the tragic death of Ian Tomlinson at the hands of a police constable during the 2009 G-20 Summit in London, Her Majesty's Inspectorate of the Constabulary incorporated the principles of ESIM into its recommendations for reforming protest policing in England and Wales.²²² Consider the following passage from the Inspectorate's review:

"Indiscriminate use of force by the police can create a sense of unity in the crowd through a common perception of the illegitimacy of police action and corresponding opposition in response. Perceptions of police legitimacy are critical because they affect the crowd's internal dynamics, facilitating or undermining the ability of those seeking conflict to exert social influence over others in the crowd. Consequently, there is an increase in the numbers within the crowd who perceive conflict against the police as acceptable or legitimate behavior, thereby empowering those prepared to engage in physical confrontation with the police. In this way, the crowd is drawn into conflict

214. *See generally* INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6.

215. Drury & Reicher, *supra* note 189, at 713.

216. Drury & Reicher, *supra* note 189, at 713.

217. Drury & Reicher, *supra* note 189, at 713.

218. *See infra* note 219 and accompanying text.

219. *See* Reicher et al., *supra* note 188, at 556; *see also* Clifford Stott, Martin Scothern & Hugo Gorringer, *Advances in Liaison Based Public Order Policing in England: Human Rights and Negotiating the Management of Protest?* 7 POLICING: J. POL'Y & PRAC. 212 (2013).

220. Stott et al., *supra* note 219.

221. HER MAJESTY'S INSPECTORATE OF CONSTABULARY, *ADAPTING TO PROTEST: NURTURING THE BRITISH MODEL OF POLICING* 86 (2009), <https://www.justiceinspectorates.gov.uk/hmic/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>.

222. Roger Smith, *Ian Tomlinson Inquest Proves We Have Moved Forward*, L. SOC'Y GAZETTE (May 19, 2011), <http://www.lawgazette.co.uk/analysis/ian-tomlinson-inquest-proves-we-have-moved-forwards/60507.fullarticle>; *see also Id.*

even though the vast majority had no prior intention of engaging in disorder.”²²³

The review urged police in England and Wales to adopt a variety of strategies and tactics that would minimize the extent to which protesters would “transfer” their grievances toward the police.²²⁴ Police in several Western European nations have also incorporated the ESIM principles into their strategies for policing protests and other public order events.²²⁵ These approaches have been especially successful in reducing crowd violence at sporting events.²²⁶

IV. A NEW VISION FOR THE FUTURE OF PROTEST POLICING

The shooting of Michael Brown and the police response to the protests in and around Ferguson following his death set in motion a new national discourse on police behavior in the U.S. Much of this conversation has focused on police abuse of authority, particularly with regard to the treatment of minorities.²²⁷ The President’s Task Force on 21st Century Policing was established in December 2014 to examine these issues in detail and to make recommendations for reform.²²⁸ The Task Force was charged with examining a wide range of policing issues, most of which are beyond the scope of this article. However, the Task Force issued one recommendation and two action items focused on police response to protests and mass demonstrations.²²⁹ I begin this section by reviewing the Task Force’s coverage of the police response to protests. I then outline a new vision for the future of protest policing in the U.S. that is consistent with the Task Force’s recommendations.

The Task Force’s report to the president noted that protests and mass demonstrations “are occasions where evidence-based practices successfully applied can make the difference between a peaceful demonstration and a

223. HER MAJESTY’S INSPECTORATE OF CONSTABULARY, *supra* note 221, at 86.

224. HER MAJESTY’S INSPECTORATE OF CONSTABULARY, *supra* note 221.

225. HER MAJESTY’S INSPECTORATE OF CONSTABULARY, *supra* note 221, at 86.

226. See e.g., Council of the European Union, *Concerning and Updated Cooperation and Measures to Prevent and Control Violence and Disturbances in Connection with Football Matches with an International Dimension, in Which at Least One Member State is Involved*, OFFICIAL J. EUR. UNION (June 3, 2010), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010G0624\(01\)&rid=2](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010G0624(01)&rid=2); see also Clifford Stott, Otto Adang, Andrew Livingstone & Martina Schreiber, *Variability in the Collective Behaviour of England Fans at Euro2004: ‘Hooliganism’, Public Order Policing and Social Change*, 37 EUR. J. SOC. PSYCHOL. 75, 78–79 (2007).

227. Conor Friedersdorf, *Ferguson’s Conspiracy Against Black Citizens*, THE ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/national/archive/2015/03/ferguson-as-a-criminal-conspiracy-against-its-black-residents-michael-brown-department-of-justice-report/386887/>.

228. Press Release, The White House, President Obama Announces Task Force on 21st Century Policing (Dec. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/18/president-obama-announces-task-force-21st-century-policing>.

229. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 88–89.

riot.”²³⁰ This statement is reminiscent of the findings of several presidential commissions during the Civil Rights era (outlined in Part II) and the findings from social science research on compliance, defiance, and crowd behavior (outlined in Part III). In Recommendation 2.7, the Task Force urged police agencies to “create policies and procedures “...for policing mass demonstrations that employ a continuum of managed tactical resources that are designed to minimize the appearance of a military operation and avoid using provocative tactics and equipment that undermine civilian trust.”²³¹ This recommendation included two “action items.”²³²

The first action item called for police agencies to develop policies and procedures “for implementing a layered response to mass demonstrations that prioritize de-escalation and a guardian mindset.”²³³ These policies could include plans to minimize confrontation by using ‘soft look’ uniforms, having officers remove riot gear as soon as practical, and maintaining open postures.”²³⁴ This suggestion is consistent with a larger movement in policing to recast the role of police as *guardians* rather than *warriors*.²³⁵ The Task Force quoted my written testimony in noting that “when officers line up in a military formation while wearing full protective gear, their visual appearance may have a dramatic influence on how the crowd perceives them and how the event ends.”²³⁶

The second action item recommended that the federal government establish an enforcement mechanism “for investigating complaints and issuing sanctions regarding the inappropriate use of equipment and tactics during mass demonstrations.”²³⁷ Currently, the only realistic recourse for those whose constitutional rights have been violated by police during protests is to file a civil rights lawsuit.²³⁸ These are often beyond the means of protesters and they can take years to reach a settlement or verdict.²³⁹ Moreover, given that settlements are typically paid from municipal budgets, they tend not to impose any real costs on police departments and are therefore weak deterrents.²⁴⁰

230. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 20.

231. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 25.

232. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 89.

233. INST. FOR INTERGOVERNMENTAL RESEARCH *supra* note 6, at 89.

234. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 25.

235. See Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NEW PERSP. IN POLICING (Apr. 2015), <https://www.ncjrs.gov/pdffiles1/nij/248654.pdf>.

236. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 25.

237. INST. FOR INTERGOVERNMENTAL RESEARCH, *supra* note 6, at 25.

238. 42 U.S.C. § 1983 (1979).

239. MARTIN SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES 1, at 216 (4th ed. 2013).

240. Aviva Shen, *Why Taxpayers Will Get Stuck With the Bill for the Ferguson Lawsuit*, THINK PROGRESS (Aug. 31, 2014), <http://thinkprogress.org/justice/2014/08/31/3477604/ferguson-lawsuit-expensive-police-misconduct/>.

Federal intervention could help hold police accountable for civil rights violations committed during protests and mass demonstrations.²⁴¹

The new vision of protest policing outlined in this section begins to flesh out how police agencies and those who regulate, fund, and train them can enact specific reforms consistent with the Task Force's Recommendation 2.7.²⁴² It is based on a framework developed by crowd psychologists who have worked closely with police forces throughout Europe to develop more thoughtful and effective public order policing strategies.²⁴³ The four elements in this framework are education, facilitation, communication, and differentiation.²⁴⁴ Developing fairer and more effective approaches to protest policing means ensuring that these four elements are fully integrated into all relevant structures, policies, operational procedures, and training curricula.²⁴⁵

A. Education

As noted in Part III, crowds are often heterogeneous, composed of subgroups with distinct (though perhaps overlapping) social identities that influence the attitudes and behaviors of their members.²⁴⁶ Crowd psychologists emphasize that police must educate themselves about the social identities of these subgroups, including "their values and standards, aims and goals, their sense of what is right and proper, their stereotypes and expectations of other groups, their history of interaction with these groups," and anything else of significance to them.²⁴⁷ Police often gather criminal intelligence on protesters with a history of violence or other criminal behavior, but it is much less common for police to gather information about the social identities of non-criminal participants.²⁴⁸ In a study I conducted on the police response to the Occupy protests, one of the protesters we interviewed reinforced this idea, noting that "police know the hotheads; they should know their allies too."²⁴⁹ Police should learn as much as they can about influential moderates in a crowd

241. See Kami Chavis Simmons, *The Coming Crisis in Law Enforcement and How Federal Intervention Could Promote Police Accountability in a Post-Ferguson United States*, 2 WAKE FOREST L. REV. 101 (2014).

242. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 8, at 25.

243. See Reicher et al., *supra* note 188, at 558.

244. Reicher et al., *supra* note 188, at 566.

245. See Reicher et al., *supra* note 188, at 558.

246. See Part III, *supra*.

247. Reicher et al., *supra* note 188, at 566.

248. Reicher et al., *supra* note 188, at 566.

249. Edward R. Maguire & Megan Oakley, POLICING PROTESTS: LESSONS FROM THE OCCUPY MOVEMENT AND BEYOND, <http://www.american.edu/spa/jlc/occupy/> (last visited May 24, 2016) (describing a nation-wide research study by American University and the Dept. of Justice Office of Community Oriented Policing Services to examine how police departments have responded to the Occupy Wall Street protests.).

who may be able to help the police prevent or reduce conflict.²⁵⁰ Understanding the nature and composition of a crowd will enable police to develop more nuanced protest policing strategies.²⁵¹

Many types of information may be useful for informing police about protesters and their intentions. The most important source of information is direct communication with protest leaders or organizers, which I address later in this section. Social media sites where protesters discuss their perspectives and intentions are another valuable source.²⁵² More traditional criminal intelligence methods such as the use of undercover officers, informants, and various types of surveillance can also provide valuable information, though police must be careful in using them.

In the absence of criminal conduct, collecting intelligence on otherwise lawful activities can raise constitutional issues and undermine community trust.²⁵³ Regardless of which sources are used, detailed information about the groups participating in an event can help provide police with a clearer sense of the most appropriate policing strategies.²⁵⁴ According to crowd psychologists, “by understanding the social identities of groups in the crowd, it is possible to know what the aims of the groups are, whether and how to support them, the forms of police action that might antagonize them and make them more sympathetic to violent elements in the crowd.”²⁵⁵ This information should play a key role in the selection of strategies and tactics that are more commensurate with the potential threat.

Gathering information or seeking advice from other police agencies is another way police can prepare for protests and other public order events. For example, after three college students died in separate incidents associated with spontaneous sports celebrations from 2004-2008, the Boston Police Department (BPD) brought in police officials from Northern Ireland to help revise their crowd management and crowd control practices.²⁵⁶ While peer knowledge sharing can provide many benefits, there are two potential

250. Reicher et al., *supra* note 188, at 566–68.

251. See Reicher et al., *supra* note 188.

252. Zeynep Tufekci & Christopher Wilson, *Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square*, 336 J. COMM’N 363 (2012) (discussing the extensive use of social media by protest organizers and attendees).

253. See Theodore Cooperstein, *The Emerging Interplay Between Law Enforcement and Intelligence Gathering*, FEDERALIST SOC’Y L. & PUB. POL’Y STUD. (Dec. 1, 1997), <http://www.fed-soc.org/publications/detail/the-emerging-interplay-between-law-enforcement-and-intelligence-gathering>.

254. See Reicher et al., *supra* note 188.

255. See Reicher et al., *supra* note 188, at 566.

256. Maria Cramer, *Police Get Irish Tips on Crowd Policing*, BOS. GLOBE (Aug. 28, 2008), http://www.boston.com/news/local/articles/2008/08/28/police_get_irish_tips_on_crowd_policing/.

limitations. First, bad practices can spread just as easily as good practices.²⁵⁷ Larger agencies that do a terrible job of handling protests, including agencies whose bad decisions have resulted in costly civil settlements or verdicts, are often happy to advise other agencies on how to police protests and other events.²⁵⁸

A common mistake is to confuse technical competence in riot control tactics with the much more challenging level of competence necessary to keep the peace while preserving people's constitutional rights. Second, importing practices from other agencies in an uncritical way can result in the adoption of one-size-fits-all solutions that do not fit local circumstances and values. Although emulating agencies that are viewed as successful is common, much can also be learned from the mistakes made by others. For example, Chief Susan Riseling of the University of Wisconsin-Madison has written an insider's account of the police response to protests at the Wisconsin State Capitol in 2011. Her candid discussion of mistakes made and lessons learned is a valuable resource for other police leaders.²⁵⁹ Another valuable resource are after-action reports written following demonstrations and other major events. The information in these reports can help police leaders think carefully about their own approaches to protest policing.

B. Facilitation

Police often view protests and mass demonstrations from the perspective of how to control or regulate them. This is understandable given that police are responsible for preserving public order and ensuring that such events remain peaceful and lawful. However, when protesters are exercising their First Amendment rights, the perception that police are exerting too much control can give the impression that police are simply trying to limit constitutionally protected behavior. As noted in Part III, perceptions of police fairness play an important role in shaping relationships between police and the public. This is especially true during protests and demonstrations because protesters tend to have "a heightened sense of grievance" that can easily be directed toward the police.²⁶⁰ The police can minimize this transfer of grievance by allowing protesters "a fair and reasonable chance to make their point peacefully."²⁶¹ By seeking to *facilitate* peaceful protests rather than only to control or regulate them, police can improve their relationships with protesters and reduce the

257. See *infra* note 260 and accompanying text.

258. See *infra* note 260 and accompanying text.

259. See generally SUSAN RISELING, A VIEW FROM THE INTERIOR: POLICING THE PROTESTS AT THE WISCONSIN STATE CAPITOL (2013).

260. HER MAJESTY'S INSPECTORATE OF CONSTABULARY, *supra* note 224, at 7.

261. HER MAJESTY'S INSPECTORATE OF CONSTABULARY, *supra* note 224, at 7.

likelihood of conflict and violence.²⁶² This becomes especially important when protests are focused on the police, since any perceived injustice will inevitably magnify the crowd's concerns.

Embracing the idea of facilitation will require police to rethink every aspect of the protest policing process. As crowd psychologists have explained:

“An emphasis on facilitation needs to be paramount at all stages of the police operation. In planning for an event one needs to identify the legitimate aims of crowd members in order to consider how best to organize policing so as to enable them to be met. If there is some reason why they cannot be met in the way that organizers request it is essential not simply to give a negative response, but to be positive and creative in finding alternative ways of meeting (and being seen to meet) the underlying aims.”²⁶³

It is a common belief in policing that if parts of a crowd become violent or destructive, then facilitation is no longer appropriate.²⁶⁴ To the contrary, this is precisely when facilitation becomes most essential. Under such circumstances, if it becomes necessary for police to make arrests or impose limits on the crowd, police should rely on the principles outlined in Part III, explaining what they are doing and why. Moreover, they should ensure that law-abiding and peaceful members of the crowd can continue to engage in legitimate forms of expression.²⁶⁵ As I will explain shortly, police should adopt a “differentiated” response that takes whatever actions are necessary to address those who are behaving in a violent or destructive manner, while continuing to facilitate the rights of peaceful protesters.²⁶⁶ Social psychologists caution that at this point, “a clear indication that the police are supporting collective aims (and that violence endangers them) can make the difference between escalation and de-escalation.”²⁶⁷

A commitment to facilitating lawful First Amendment expression will also require police to remain neutral even when they disagree with the content of that expression.²⁶⁸ Neutrality is the cornerstone of First Amendment case law, which allows police to assert reasonable time, place, and manner restrictions

262. See Reicher et al., *supra* note 188.

263. Reicher et al., *supra* note 188, at 567.

264. Reicher et al., *supra* note 188, at 567.

265. Reicher et al., *supra* note 188, at 567.

266. Reicher et al., *supra* note 188, at 567–69.

267. Reicher et al., *supra* note 188, at 567.

268. See Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 649, 680 (2002) (Not all speech is protected by the First Amendment. Some examples of unprotected speech include threats, incitement, fighting words, and libel).

on protests, but these restrictions must be *content neutral*.²⁶⁹ In *Texas v. Johnson*, Justice William Brennan stated, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁷⁰

Asking police officers to facilitate free speech that they find offensive may be challenging for police leaders, but it is an essential part of transforming police into “trusted guardians of democracy.”²⁷¹ Another key aspect of facilitation is ensuring that police do not interfere with the work of journalists who are covering protests.²⁷² Freedom of the press is enshrined in the First Amendment. Unfortunately, many journalists have been arrested or have had force used against them by police while covering protests.²⁷³ As noted in Part I, police harassment of journalists became a major issue in the Ferguson protests.²⁷⁴

C. Communication

Communication is an essential ingredient of community policing.²⁷⁵ Effective communication between police and communities can help to establish goodwill, resolve crises, and prevent conflict.²⁷⁶ Communication is also an essential component of fair and effective protest policing.²⁷⁷ Although many types of internal and external communication are important, here I focus primarily on communication between police and protesters.²⁷⁸ Communication is an essential means by which police can learn about the aims of event organizers and how police can help facilitate these aims.²⁷⁹ It is also a useful

269. *See id.* at 651 n.19 (stating that neutrality is also embedded in the Fourteenth Amendment’s equal protection clause, which prohibits states from denying people “equal protection of the laws.”).

270. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

271. *See Rahr & Rice, supra* note 235, at 7.

272. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW & HUMAN RIGHTS, ACADEMY BRIEFING NO. 5: FACILITATING PEACEFUL PROTESTS 15 (2014).

273. *See id.* at 3–4.

274. *See* Part I, *supra*.

275. Edward R. Maguire & William H. Wells, *Community Policing as Communication Reform*, in *LAW ENFORCEMENT, COMMUNICATION, AND COMMUNITY* 36 (Howard Giles ed., 2002).

276. *See id.* at 42.

277. Reicher et al., *supra* note 188, at 567.

278. Communication within police agencies and between police and other public safety agencies is also an important issue worthy of careful consideration. For example, interoperability issues arise frequently in multiagency and multijurisdictional responses to protests and other public order events. However, these types of communications issues are beyond the scope of this article.

279. Reicher et al., *supra* note 188, at 568.

way for police to discover potential public safety issues and to work together with protest leaders to address these issues.²⁸⁰

Communication between police and protesters can be very challenging. Protests are often highly decentralized and disorganized.²⁸¹ Some protests emerge spontaneously and therefore don't have clear leadership or direction. Others, like the Occupy movement, reject the idea of leadership and hierarchy out of principle.²⁸² Many protests are loud and chaotic and take on a life of their own, thus whenever possible, police should communicate with protesters long before the actual protest.

Communication between police and protesters is especially difficult when the two parties have a history of conflict. Social psychologists note that in such instances, "the very attempt to tell crowd members how policing is designed to facilitate them may be seen as dishonest and actually exacerbate hostility."²⁸³ These challenges are intensified when protests are focused on the police. Protesters may try to goad the police into mistreating them to prove a point or to provide grounds for a lawsuit. It is especially important in moments like this to alter the interpersonal dynamic in order to prevent conflict or violence. Communicating patiently and professionally with people who are angry or frustrated with you or the institution you represent can go a long way toward de-escalating conflict.

Some police agencies assign officers to stand in a rigid, formal manner in a fixed position or skirmish line during protests, without engaging in dialogue with protesters.²⁸⁴ Sometimes skirmish lines are necessary to contain a riotous crowd. However, as noted in a report by the Berkeley police, "skirmish lines should be deployed judiciously and only in those situations where the reasonable use of force that may be necessary to enforce the line and protect officers is warranted by the objective of deploying the line."²⁸⁵ A better approach is to encourage officers to interact with crowds in a friendly manner whenever possible. This humanizes the police, enabling protesters to see the person behind the badge. While officers should not take sides or get involved

280. Reicher et al., *supra* note 188, at 567.

281. See Naomi Klein, *Were the DC and Seattle Protests Unfocused?*, NAOMI KLEIN (2001), <http://www.naomiklein.org/articles/2001/07/were-dc-and-seattle-protests-unfocused>.

282. Natasha Koustova, Catherine T. Kwantes, Gregory Thrasher, & Trevin Fernando, *Leadership Structures in Leaderless Social Movements*, in WINNING REVOLUTIONS: THE PSYCHOSOCIAL DYNAMICS OF REVOLTS FOR FREEDOM, FAIRNESS, AND RIGHTS 2, 37 (J. Harold Ellens ed., 2014).

283. Reicher et al., *supra* note 188, at 567.

284. Justin George, "Hold the Line" commands protected lives during riot, BALT. SUN (June 30, 2015), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-riot-deployments-2015-0629-story.html>.

285. BERKELEY POLICE DEPARTMENT, RESPONSE TO CIVIL UNREST: A REVIEW OF THE BERKELEY POLICE DEPARTMENT'S ACTIONS & EVENTS OF DEC. 6 & 7, 2014, 50 (2015).

in debating the issues under protest, open communication between police and protesters is useful for establishing trust and preventing conflict. When police communicate with protesters calmly and respectfully, it can help to encourage cooperation with police. This is the approach used by the “Dialogue Police” in Sweden, where officers mingle with crowds and rely on ongoing dialogue to build trust and reduce conflict.²⁸⁶

Consistent with the notion of community policing, forming partnerships with key stakeholders can also provide many benefits.²⁸⁷ Thinking of protest organizers and participants as allies rather than enemies can make the job of police much easier. As noted in Part III, an important part of policing protests successfully is behaving in ways that encourage protest groups to regulate the behavior of their own members.²⁸⁸ This can only be accomplished through effective communication between protesters and police. Another way for police to enhance their perceived legitimacy during protests is to develop strong partnerships with the media. After the 2009 G-20 Summit in London, Her Majesty’s Inspectorate of the Constabulary noted that police must “develop more effective media communication strategies... It is no longer an option for the police not to include the media in briefings before, during and after large scale public order events.”²⁸⁹

D. *Differentiation*

The discussion of crowd psychology in Part III outlined the perils of treating a crowd as homogeneous and taking action against the whole crowd based on the misbehavior of certain individuals.²⁹⁰ Treating moderate members of a crowd who are engaged in lawful behavior as criminal can inadvertently encourage them to align with more radical members against the police. When police behave in ways that moderates perceive as unjust or overly aggressive, police may do more harm than good. Whenever possible, police should rely on a *differentiated* response by continuing to facilitate peaceful and lawful behavior even when taking enforcement action against lawbreakers.²⁹¹ Consistent with the research evidence presented in Part III, this approach is intended to preserve the perceived legitimacy of the police and reduce the likelihood of widespread defiance or rebellion.²⁹²

286. STEFAN HOLGERSSON, *DIALOGUE POLICE: EXPERIENCES, OBSERVATIONS & OPPORTUNITIES* 6 (Stockholm National Police Board ed. 2010).

287. *See id.* at 52; *see also* Reicher et al., *supra* note 188.

288. *See* Part III, *supra*.

289. HER MAJESTY’S INSPECTORATE OF CONSTABULARY, *supra* note 221, at 31.

290. *See* Part III, *supra*.

291. Reicher et al., *supra* note 188, at 567.

292. *See* Part III, *supra*.

Developing a differentiated response strategy that is consistent with the research evidence presented in Part III means reconsidering three factors. First, whenever possible, arrests should be made sparingly. Mass arrests are often unnecessary and can result in costly civil rights lawsuits.²⁹³ Second, police should only use force against protesters as a last resort when alternative measures have failed. Police sometimes use officer safety concerns as a justification to use force against protesters. Ironically, the indiscriminate use of force by police may place officers at *greater* risk by increasing the number of angry people who view the use of violence against police as justifiable.²⁹⁴ Third, the use of overly restrictive crowd containment methods may impose an unnecessary burden on peaceful protesters, thus encouraging an atmosphere of defiance and rebellion against police. The use of “kettling” – in which crowds are detained for long periods within police cordons, often without access to food, water, or bathrooms – endangers protesters (and in some cases, innocent bystanders) and is a recipe for conflict. Indiscriminate crowd containment measures also result in costly civil rights lawsuits.²⁹⁵ A differentiated response strategy seeks to ensure that police actions only impose a burden on those who are breaking the law.²⁹⁶

Crowd psychologists emphasize that differentiation cannot simply be tacked on to existing policing strategies.²⁹⁷ Instead, it must be “built into every tactical or strategic decision, into training, planning, equipping, briefing, and operating in crowds.”²⁹⁸ A differentiated police response focuses enforcement action on those in a crowd whose illegal behavior is endangering public safety.²⁹⁹ Meanwhile, police continue facilitating the lawful and peaceful behavior of other crowd members. A challenge that arises in encouraging police to implement more differentiated response strategies is a concern with officer safety.³⁰⁰ Asking police officers to enter crowds without protective gear raises questions about how officers will protect themselves if the crowd turns unruly. One solution is to adopt a *graded* response plan for events in which crowd violence is thought to be a possibility.³⁰¹ In a graded response, tactical assets are staged nearby but out of sight and can be deployed rapidly if

293. See JP Massar, *Mass arrest lawsuit settled – ODP costs Oakland’s taxpayers yet another cool \$1,000,000*, DAILY KOS (June 24, 2013, 12:55 PM), <http://www.dailykos.com/story/2013/6/24/1218443/-Mass-Arrest-Lawsuit-Settled-OPD-Costs-Oakland-s-Taxpayers-Yet-Another-Cool-1-000-000>.

294. Reicher et al., *supra* note 188, at 563–64.

295. See JP Masser, *supra* note 293.

296. Reicher et al., *supra* note 188, at 568–69.

297. Reicher et al., *supra* note 188, at 569.

298. Reicher et al., *supra* note 188, at 569.

299. Reicher et al., *supra* note 188, at 569.

300. Reicher et al., *supra* note 188, at 568.

301. HER MAJESTY’S INSPECTORATE OF CONSTABULARY, *supra* note 223, at 81.

needed.³⁰² If they are visible to the crowd, instead of enhancing officer safety, they may place officers at greater risk by escalating matters.³⁰³

In my study of the police response to the Occupy protests, police officials from several agencies acknowledged the problems with deploying officers in riot gear.³⁰⁴ In Madison, for example, one official stated that when officers wear riot gear, “it incites a type of reaction that might backfire and agitate.”³⁰⁵ In Charlotte, an official said “once the hats and bats and turtle suits come out, it brings aggression with it.”³⁰⁶ In Cleveland, an official said wearing riot gear “sets the tone in a bad way and scares people.”³⁰⁷ Another official from Cleveland noted that “police must set the tone for civility, not confrontation.”³⁰⁸ Former police chief Chris Burbank from Salt Lake City told us that “if you line up a bunch of police officers with riot gear and shields, you are telling protesters ‘to go ahead and throw rocks and bottles at us’.”³⁰⁹ While riot gear is essential in certain circumstances, using it prematurely can trigger unanticipated consequences.

The use of a graded, differentiated response can be challenging when multiple agencies are involved in policing an event.³¹⁰ Mutual aid from other police agencies raises many complex issues, including interagency differences in how to handle protests.³¹¹ These may result from explicit differences in protest policing strategy, but more often they result from differences in training or experience.³¹² Mutual aid agreements must ensure that agencies rely on similar strategies and tactics. This can be very challenging, particularly for spontaneous events or those that involve a large area or number of

302. See Christine Byers, *Justice Department faults Ferguson protest response*, ST. LOUIS POST-DISPATCH (June 30, 2015), http://www.stltoday.com/news/local/crime-and-courts/justice-department-faults-ferguson-protest-response/article_32d55f9f-0bf4-51e4-93d6-71b873cb8038.html.

303. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW & HUMAN RIGHTS, *supra* note 272, at 17–18.

304. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, *supra* note 272, at 17–18.

305. GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, *supra* note 272, at 17–18.

306. Maguire & Oakley, *supra* note 249.

307. Maguire & Oakley, *supra* note 249.

308. Maguire & Oakley, *supra* note 249.

309. Maguire & Oakley, *supra* note 249.

310. EDWARD CONNORS, PLANNING AND MANAGING SECURITY FOR MAJOR SPECIAL EVENTS: GUIDELINES FOR LAW ENFORCEMENT 4 (U.S. Dep’t Just. ed., 2007).

311. *Id.*

312. Maguire & Oakley, *supra* note 249.

participants.³¹³ For example, during the protests that erupted in and around Ferguson in August 2014, more than 50 police agencies responded, resulting in what has been described as “a mishmash of tactics and confusion.”³¹⁴

The use of a graded, differentiated response strategy can be difficult for officers working on the front lines of a protest.³¹⁵ Unfortunately, some protesters choose to taunt officers, trying to goad them into responding inappropriately. Officers may also fear for their safety, particularly when wearing soft uniforms. For many officers, the combination of stress, fear, and fatigue can make it very challenging to police protests. At events in which officers are being taunted or where there is a threat of violence, officers should be rotated out periodically to have a break before resuming their duties. Good supervisors will pay attention to signs of emotional or physical distress among officers and relieve these officers as needed. Officers should also be trained to pay attention to these same issues in themselves and their peers and to respond as needed to prevent conflict or other issues.

CONCLUSION

The four principles we have articulated in this article – education, facilitation, communication, and differentiation – form the basis for a new vision of protest policing in the U.S. Unfortunately, some police agencies still handle protests much as they did in the 1960s. Moreover, some agencies do not seem to be dissuaded by costly civil settlements that result from a pattern of abusive and unconstitutional practices that violate the civil rights of protesters, journalists, and bystanders. Yet, my study of the police response to the Occupy movement revealed numerous instances of police leaders developing thoughtful, fair, and effective approaches to policing protests.

Research on compliance, defiance, and crowd behavior provides a useful foundation for developing thoughtful policing strategies for handling protests. The goal is to implement strategies that encourage the crowd to regulate itself, thus reducing some of the burden on police. According to crowd psychologists, one good way to accomplish this goal is:

“...to place a major emphasis on how to be supportive towards crowd members pursuing legal goals and activities, even under conditions where one is aware of the presence of groups with illegal goals and even at points where these groups start to act in illegal or violent ways. Such an emphasis makes it more likely that crowd members will, at best, suppress violence their midst. At

313. Ben Kesling & Pervaiz Shallwani, *Ferguson Police Tactics Challenged as Conflict Evolved: Critics Fault Authorities for Lack of Coordination*, WALL ST. J. (Aug. 31, 2014), <http://www.wsj.com/articles/ferguson-police-tactics-challenged-as-conflict-evolved-1408675855>.

314. *See id.*

315. Reicher et al., *supra* note 188, at 569.

worse, one can expect members to isolate people acting violent and accept police action against violent groups should it prove necessary.”³¹⁶

Through the use of strategies that incorporate the basic principles outlined in this section – education, facilitation, communication, and differentiation – police agencies can deal with people who are breaking the law while upholding the constitutional rights of those who are engaged in peaceful and lawful First Amendment expression.

316. Reicher et al., *supra* note 188, at 569.

